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SUPREME COURT OF THE UNITED STATES

October Term, 1940.

No. 757

CRAB ORCHARD IMPROVEMENT COMPANY,
A CORPORATION,
PETITIONER,

versus

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,
RESPONDENT.

PETITION, AND BRIEF IN SUPPORT THEREOF, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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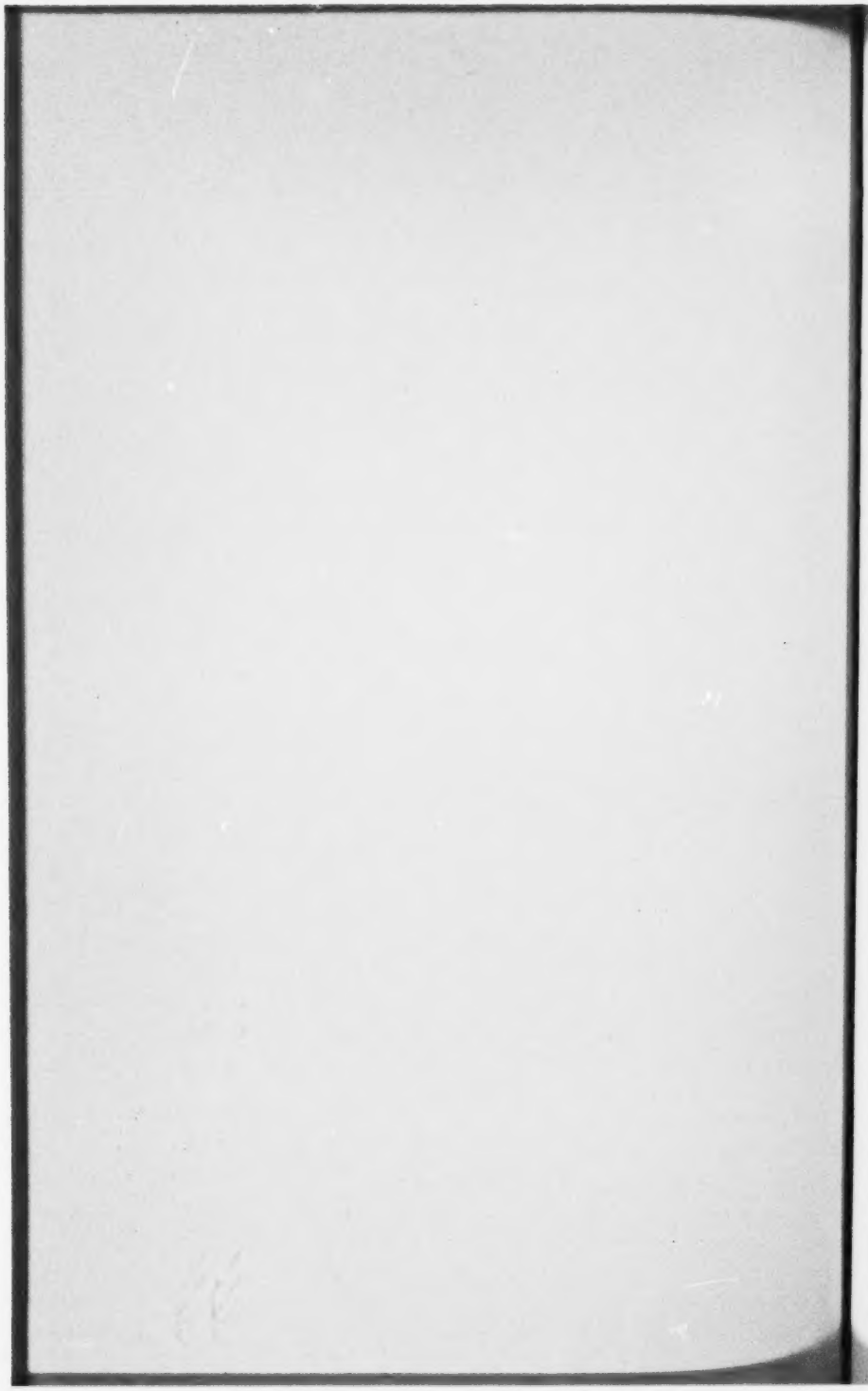

SUPREME COURT OF THE UNITED STATES

No.

CRAB ORCHARD IMPROVEMENT COMPANY,
a corporation, Petitioner,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Crab Orchard Improvement Company, prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in Crab Orchard Improvement Company vs. Chesapeake and Ohio Railway Company, 115 Fed. 2nd, 277. The opinion of the District Court is reported in Crab Orchard Improvement Company vs. Chesapeake and Ohio Railway Company 33 Fed. Sup. 580.

SUMMARY AND STATEMENT.

The appellant, Crab Orchard Improvement Company, referred to hereafter as Improvement Company, employs a large number of men in the operation of its coal mine at Eccles, West Virginia. It is a subscriber to the West Virginia Workmen's Compensation Fund. The appellee, Chesapeake and Ohio Railway Company, referred to hereafter as Railway Company, operates a railroad near the Improvement Company's coal mine and under its coal tipple where coal from the mine is dumped and loaded into railroad cars on the Railway Company's track placed there for that purpose. Andy Henry was Improvement Company's employee at its coal tipple and in the course of his duty it was necessary for him to walk back and forth across the railway tracks. On December 9, 1936 one of the Railway Company's engines pushing a load of coal cars along the track at said coal tipple was so negligently operated by the employees of the Railway Company that it struck Andy Henry as he was crossing the tracks in the performance of his duties for the Improvement Company, killing him instantly. The Improvement Company was in no way at fault in respect to the accident, but being a subscriber to the West Virginia Workmen's Compensation Fund, was compelled by operation of the West Virginia law to pay $4000 into the Workmen's Compensation Fund as result of Henry's death and to pay an increased rate in premiums to said fund which, up to the time of the filing of this action, amounted to $11,000. By this action the appellant Improvement Company seeks to recover from the appellee Railway Company the amount which it has been compelled to pay as result of the Railway Company's wrongful act in killing Andy Henry.

No proof was taken and there was no trial on the

merits. The case comes upon a demurrer to (later a motion to dismiss) the plaintiff's declaration.

The District Court dismissed the action and the Circuit Court of Appeals for the Fourth Circuit affirmed the ruling of the District Court.

JURISDICTION.

The judgment of the Court below was entered November 12, 1940.

The jurisdiction of the United States District Court was originally invoked by the appellee under the statute relating to diversity of citizenship. Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is invoked under Act of March 3, 1891, as amended, Judicial Code, Sec. 240 amended, 8 F.C.A. Title 28, Sec. 347. Also Supreme Court Rule 38 Paragraph 5 (b). Particularly is jurisdiction invoked because the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is believed to be in conflict with the decision of the Circuit Court of Appeals for the 10th Circuit on the same matter.

QUESTION PRESENTED

Whether an employer who has been forced to pay a definite sum into the State Workmen's Compensation Fund because of the death of one of its employees resulting from the negligence of a third party, may recover the amount so paid, through no fault of its own, from the negligent third party, in the absence of any provision for subrogation or assignment in the State Workmen's Compensation Act.

STATUTES INVOLVED

There are no Federal Statutes involved and no local statutes involved except the absence of any provision for subrogation or assignment in the West Virginia Workmen's Compensation Act. The absence of such provision is conceded.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit in this case is believed to be in conflict with the decision of the Circuit Court of Appeals for the 10th Circuit upon the same matter involved in this case. (See Staples v. Central Surety & Insurance Corporation 1932 CCA 10th Circuit, 62 Fed. 2nd 650 cited in brief)

(2) Although there are no applicable local decisions, the decision of the Circuit Court of Appeals is believed to be so in conflict with the equities favoring the appellant as to amount to a denial of justice.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the appellant was not entitled to maintain this action against the appellee on the basis of quasi-contractual indemnity.

2. In holding that the appellant does not have a common law right of subrogation against the third party tort-feasor.

3. In holding that the third party tort-feasor by his negligence in killing of the employee had breached no legal duty owed to the employer.

4. In giving judgment for the appellee and affirming the decision of the District Court.

Wherefor, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit.

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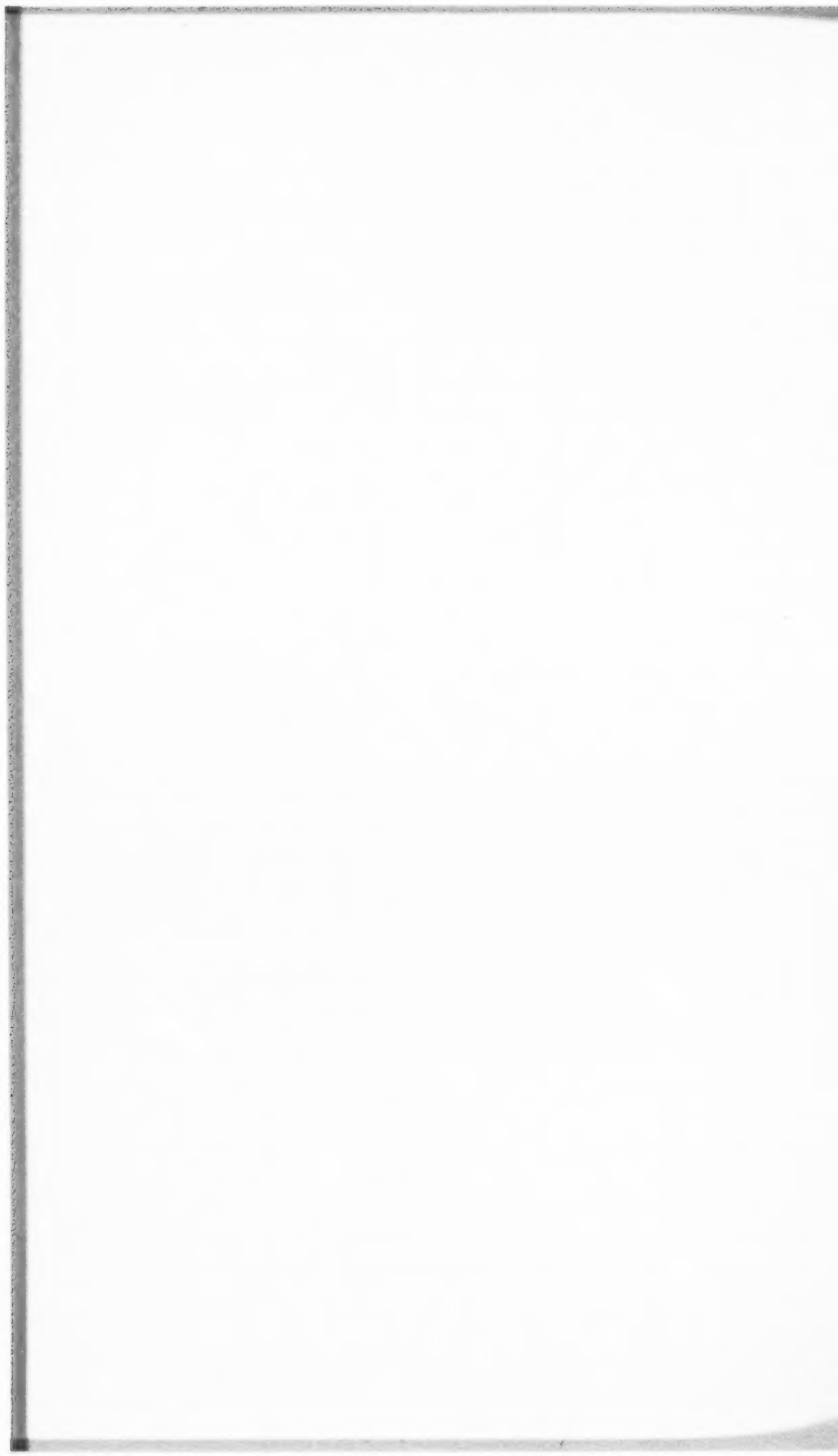

SUBJECT INDEX

	Page
Table of Cases cited	8
Opinion of Courts below	9
Grounds for Jurisdiction	9
Statement of the case	10
Specification of errors to be urged	11
Argument	12
Points raised and contended for by Appellant	12
FIRST: When Andy Henry was killed in the course of his employment the appellant was required by the West Virginia Workmen's Compensation Act and the decisions of the West Virginia Supreme Court thereunder, to pay a lump sum into the Compensation fund and to submit to an increased rate of premiums	12
SECOND: An action by the appellant to recover the amount it has been compelled to pay may be maintained upon the common law principles of indemnity and subrogation entirely independent of the provisions of West Virginia Workmen's Compensation Act	12
THIRD: The right to maintain the action is not affected by the provisions of the West Virginia Wrongful Death Statute	16
FOURTH: The right to maintain the action does not depend upon assignability or any statutory provision for subrogation	17
CONCLUSION	19

TABLE OF CASES CITED

	Page
Aetna Life Insurance Company v. Moses, 287 U. S. 530; 77 L. Ed. 477	16
27 Am. Jr. 467, Indemnity Section 18	13
Annotation, 40 LRA (N. S.) 1148	16
Dayton Power & Light Company v. Westinghouse Electric & Manufacturing Company, 287 Fed. 439; 37 ALR 849	13
Fidelity & Casualty Company v. St. Paul Gas Light Company (Minn. 1922) 188 N. W. 265	17
Foster & Glassell Company v. Knight Brothers (La. 1922) 93 So. 913	13, 17
George A. Fuller Company v. Otis Elevator Company, 245 U. S. 489; 38 S. Ct. 180; 62 L. Ed. 422	13
Kelly v. Johnson (Kansas 1938) 75 Pac. 2nd. 209	
Pennsylvania Steel Company v. Washington & Berkley Bridge Company (Dist. Ct. N. D. W. Va.); 194 Fed. 1011	13
Peerless Coal Company v. Compensation Commissioner, 113 W. Va. 6; 166 S.E. 529	12
Staples v. Central Surety & Insurance Corporation, (1932, CCA 10th Circuit) 62 Fed. 2nd 650	12, 17
Travelers Insurance Company v. Great Lakes Engineering Company 107 CCA 20; 184 Fed. 426; 36 LRA (N.S.) 60	13, 16
Washington Gas Light Company v. District of Columbia, 161 U. S. 316; 16 S. Ct. 564; 40 L. Ed. 712	13
West Virginia Code, Chapter 23, Article 2, Section 4	12